86-1149

Supreme Court, U.S.
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No.

IN THE

SUPREME COURT

OF THE UNITED STATES

October Term, 1986

Larry Cunningham and
Devora Cunningham,
Petitioners,

-vs-

The United States of America,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ISSUE PRESENTED FOR REVIEW

WHETHER THE PETITIONER-APPELLANTS WERE DENIED A FAIR TRIAL AND DUE PROCESS BY THE ADMISSION OF EVIDENCE WHOLLY UNRELATED TO THE CRIME CHARGED.

Petitioners answer "Yes"

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CITATIONS OF OPINIONS BELOW

This is a request for Review of Order and Decision of the Sixth Circuit Court of Appeals affirming the Judgment of Conviction of the District Court for the Eastern District of Michigan.

JURISDICTION

Jurisdiction of this Court is invoked Title 28, Sec 1254(1)USC.

In the opening statement of the United States Attorney, representations were made that the Petitioners-Appellants, Larry Cunningham and DeVora Cunningham conspired and confederated and agreed together to commit the offense of passing, uttering and publishing counterfeit bills with the intent to defraud. (Volume V, page 537, Trial Transcript). However, during the trial the United States Attorney sought to present testimony and evidence to show that Charles Johnson in Wisconsin had pled guilty to counterfeiting. This evidence was presented over the objections of Defense Counsel. (Volume II, page 96-102, Trial Transcript).

Further, testimony was elicited from Gene Cunningham a United States Secret Service Agent in Milwaukee, Wisconsin to show that Charles Johnson plead guilty to a two count indictment charging him with conspiracy to counterfeit United States currency. (Volume II, page 102, Trial Transcript). Defense Counsel at this time reinterated his objections to his testimony (Volume II, page 110, Trial Transcript).

Thereafter a jury verdict was returned on September 3, 1984 finding the Petitioners-Appellants guilty.

The Court of Appeals affirmed the position of the District Court.

STATEMENT OF THE CASE

ARGUMENT

WHETHER TH PETITIONERS-APPELLANTS WERE DENIED A FAIR TRIAL AND DUE PROCESS BY THE ADMISSION OF EVIDENCE WHOLLY UNRELATED TO THE CRIME CHARGED.

On June 5, 1984, the Federal Grand Jury sitting in the Eastern District of Michigan returned a six count indictment against Petitioners-Appellants, Larry Cunningham and DeVora Cunningham charging them with conspiracy and passing counterfeit notes in violation of 18 USC § 371 and 18 USC 472. The United States Attorney in opening remarks indicated that she would prove that the Petitioners-Appellants DeVora Cunninghan and Larry Cunningham were engaged in a conspiracy to pass counterfeit notes, and did in fact pass counterfeit notes.

However at trial the United States Attorney sought to introduce evidence that a Charles Johnson in Milwaukee, Wisconsin was convicted by, plea of conspiracy to counterfeit United States currency charges. This is crucial because Charles Johnson

is the brother-in-law of Petitioner-Appellant DeVora Cunningham. Defense Counsel objected to introduction to this testimony but over the objections of Defense Counsel the Court permitted the United States Attorney to introduce this testimony. It is improper in a conspiracy trial for the Judge to allow hearsay testimony from an unnamed co-conspirator to establish a conspiracy in the trial before the Court. The central elements required to prove a conspiracy are that:

1. The conspiracy described in the indictment was fully formed and was existing at or about the time alleged.

2. The Defendant willfully became a member of the conspiracy.

3. One of the conspirators thereafter knowingly committed at least one overt act in furtherance of an object of the conspiracy **United States v Thompson**, 533 Fed 2d 1006, 6th Circuit, 1976.

The Court in **United States v Enwright**, 579 Fed 2d 980, 987, 6th Circuit, 1978, said the statements of co-conspirators are admissible against all Defendants proven to be members of the conspiracy where such statements are made during the course of and in furtherance of the objectives of a

conspiracy. However, before a statement can be admitted as a co-conspirator statement, the Trial Judge must make a preliminary determination; (1) that there was a conspiracy; (2) that the Defendant and the Declarant are co-conspirators; (3) that the statement was made during the course of the conspiracy; and (4) that the statement was made in furtherance of the conspiracy. If the Judge decides that the requirments have been met for admissibility the statement is admitted but no special instructions are given to the jury regarding the preliminary facts.

In **Enwright**, **supra**, the Court decided that rule 14 A Federal Rules of Evidence is applicable to the preliminary question of admissibility of co-conspirator out of court statements. This rule provides preliminary questions concerning the qualifications of a person to be a witness, the existence of a privilege or the admissibility of evidence shall be determined by the Court subject to the provisions of subdivision B in making this determination that is not bound by the rules of evidence except those with respect to privileges.

The Court in **Enwright**, **supra**, then said a determination under 104 A is more demanding that a prima facie test and calls for the exercise of judicial fact finding, responsibilities by the trial judge, responsibilities which require him to evaluate both creditability and the weight of the evidence.

The Court in **United States v James**, 590 Fed 2d 575 (1979) took the premises a step further by holding that before any statements of a co-conspirator are admitted into evidence, the prosecution must show by a preponderance of the evidence independent of the statement of co-conspirator that; (1) a conspiracy existed; (2) that the co-conspirator and the Defendant against whom the co-conspirators statement was offered were members of the conspiracy; and (3) that the statement was made during the course and in furtherance of the conspiracy. Further the Court said as a preliminary matter there must be a substantial independent evidence of a conspiracy at least enought to take the question to the jury.

In the instant cause, the Court held no hearing to make a determination as to whether or not the statments made by Charles Johnson were in fact made during the course and in furtherance of a conspiracy or in fact that a conspiracy even existed. Moreover, the fact that Charles Johnosn was a co-conspirator with the Petitioners-Appellants Larry Cunningham and Devora Cunningham. The Court in the instant cause having failed to hold a **James** hearing to determine if in fact the out of court statements of Charles Johnson were admissible committed reversible error. The Court's holding in **James**, **supra**, were further strengthed by the Court's holding in **United States v Piccalo**, 696 Fd 2, 1162, (1983) where the Court held that mere similiarity of conduct among various persons in the fact that they may have associated with each other and may have assembled together and discussed common names and interest does not necessarily establish proof of the existence of a conspiracy.

The Court said that what the evidence in the case must show beyond a reasonable doubt in order

to establish that a conspiracy existed, is that members in some way or manner or through some contrivance positively or attested came to a mutual understanding to try to accomplish a common and unlawful plan.

In the instance case, there has been no showing by the United States Attorney that the Petitioner-Appellants in any way conspired to pass counterfeit currency. Moreover, there has been no showing that Charles Johnson was a co-conspirator or in any way was involved in a conspiracy activity with the Defendants-Appellants. The facts in the case at bar are even more distinguishable from the cases cited because Charles Johnson was not a named co-conspirator, nor was his name ever brought up in the indictment of the Defendant-Appellants.

The Court in **James**, **supra**, mandated a hearing to determine if in fact the **Enwright**, factors were present prior to allowing the testimony of a co-conspirator which in essence are hearsay statements. The Court in **James**, **Enwright**, and **Piccalo**, **supra**, were acutely aware of the highly

prejudicial impact of a co-conspirators statement which is hearsay in a conspiracy trial. Hence, the evolution of the **James**, hearing requirement.

In the instant cause, the Court saw fit to allow testimony regarding a guilty plea of Charles Johnson despite the fact that Charles Johnson was not a named co-conspirator and not even remotely connected to the case at bar. It is clear that for the Court to allow this testimony was so highly prejudicial against the Defendant-Appellants that it effectively denied them of an opportunity to have a fair trial.

Moreover, the probative effect of any information relating to the fact that Charles Johnson plead guilty was clearly out weighted by the prejudicial impact that this testimony had under the Defendant-Appellants right to have a fair trial. Further, in the case **sub judice**, the Appeals Court agreed that the guilty plea evidence was irrelevant under Federal Rules of Evidence 401 and 402, but stated that the error in allowing this evidence in was harmless. We must disagree with

this conclusion for the following reason: (1) there was no evidence to link the Appellants to any conspiracy to pass counterfeit money; (2) the Court seemed to dwell on counterfeit law to justify the admission of the guilty plea when the case is clearly one of conspiracy. Further the Court of Appeals in attempting to justify the admission of the guilty plea in this cause cited a case of **Cordle v Allied Chemical**, 309 Fed 2d 821, 825 (6th Circuirt, 1962) for the proposition that an error in the admission of evidence may be cured by the subsequent use of similar evidence by the opposite party. Appellants contend that the **Cordle**, case is distinguishable from the facts of the case at bar, because the Court in that case said that an error in the admission of evidence may be cured by the subsecuent use of similar evidence by the opposite party. In the case at bar, the Appellants at no time attempted to use any evidence regarding Charles Johnon and his guilty plea taken in Wisconsin. The Court of Appeals is doing nothing more than boot strapping the facts of the case at

bar to make them conform with those of **Cordle**, **supra**.

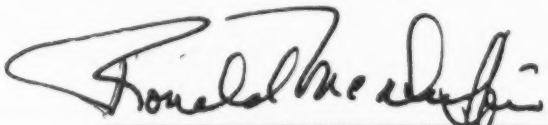
Moreover, **Cordle**, **supra**., relates to a civil cause of action and the case for this Court involves the potential loss of freedom for the Appellants. It cannot be argued in good conscience that the Court's ruling in **Cordle**, would bolster and support the admission of evidence in a criminal case which is totally irrelevant to the charges presented against the Appellants. There is no question by the Court's action in allowing this testimony. The Appellants were deprived of a fair trial.

We submit that the instant issue is of sufficient importance to the administration of criminal justice in this country to merit this Courts consideration thereof at this time.

RELIEF SOUGHT

WHEREFORE, Petitioners pray that this Honorable Court will review the issue herein presented and grant this Petition for Certiorari.

RESPECTFULLY SUBMITTED:



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See, Sixth Circuit Rule 24

No. 85-1032

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LARRY CUNNINGHAM and DEVORA CUNNINGHAM,
Defendants-Appellants.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed October 30, 1986

Before: ENGEL, KRUPANSKY and RYAN, Circuit Judges.

RYAN, Circuit Judge. The defendant Larry Cunningham appeals his conviction in district court of one count of conspiracy to utter counterfeit obligations and two counts of uttering counterfeit obligations, and DeVora Cunningham, his wife, appeals her conviction of one count of conspiracy to pass counterfeit notes and three counts of passing counterfeit notes. 18 U.S.C. §§ 371, 472.

Appellants contend that the district court erred (1) in allowing testimony regarding the guilty plea of Charles Johnson, DeVora Cunningham's brother-in-law, to conspiracy charges

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nsin, and (2) in failing to declare a mistrial based isconduct of the government's attorney in referring, ng argument, to a bank account balance which the court had excluded from evidence on defendant's y objection at trial.

We hold that the district court erred in admitting Johnson's lty plea, but that the error was harmless. Similarly, we hold that the prosecutor's inadvertent allusion to excluded evidence in her closing argument was improper, but that, in the absence of timely objection, this statement cannot be characterized as "plain error." We therefore affirm defendants' convictions.

I.

Facts

Between February 21 and March 18, 1984, defendants DeVora and Larry Cunningham passed nine counterfeit fifty- and twenty-dollar bills at five different locations in Detroit. The central issue at trial was whether they did so knowing the bills to be counterfeit.

Generally, the evidence offered on this issue was circumstantial. For example:

(1) All of the counterfeit bills passed issued from the same out-of-state counterfeiting operation;

(2) One of the alleged passes occurred *after* the telephone company notified Larry Cunningham that three of the fifty-dollar bills he had used to pay his phone bill were counterfeit;

(3) One witness claimed to recall Larry Cunningham as the man who gave her a counterfeit fifty-dollar bill "[b]ecause he asked me if we had to check the bill and I never had anyone ask me that before"; and

(4) Defendants offered various inconsistent explanations at trial for where they obtained the counterfeit bills.

The evidence most tending to fortify an inference that defendants knew the bills to be counterfeit related to the evident source of the bills. A Secret Service agent testified that the bills passed in Detroit came from a Milwaukee counterfeiting operation and that a man named Charles Johnson had supplied the paper for that operation. The agent also testified that at some point—the record does not state when—Johnson pleaded guilty to a charge of criminal conspiracy for his role in the Milwaukee counterfeiting scheme.

There was also evidence, from telephone company billing records, of a series of telephone calls between the defendants' home and business in Detroit and the home of Johnson and his wife, DeVora Cunningham's sister, in Milwaukee. These calls were made before, during, and after the period covered by the indictment in this case.

Defendants responded to this evidence with their own testimony that Johnson was DeVora Cunningham's brother-in-law and that, together with his wife, Johnson visited defendants in Detroit and stayed in their home February 17-20, 1984, the weekend before defendants began passing counterfeit bills. Defendants' testimony tended to suggest that Johnson could have learned, during his visit, of a shoebox full of cash the defendants kept in their closet and that Johnson had opportunities, over the weekend of February 17-20, 1984, to remove cash from that box, if he were so minded, and to replace it with counterfeit bills. Defendants testified that they were not close to Johnson, but that DeVora Cunningham and her sister were very close. The telephone calls, they suggested, were innocent social conversations between the two sisters.

The prosecution also produced evidence that defendants bought money orders with counterfeit bills even though they had a checking account at the time. In closing, the prosecutor argued that the only reason defendants resorted to the inconvenience of buying money orders was to launder the counterfeit bills.

Defendants responded with testimony that they were unable to write checks at the time in question because their bank had misplaced funds deposited in their checking account. In cross-examining DeVora Cunningham, the prosecutor sought to pursue this inquiry with a question that began: "If I told you that the balances on your checking account at Michigan National Bank were over $1,000 . . . ." At this point, objection to the question was sustained.

Other evidence was admitted without objection that established incidentally that the Cunninghams were relatively prosperous. Larry Cunningham testified that his business had gross annual sales in the hundreds of thousands of dollars, that he owned almost the entire city block upon which his business was located, that he ordinarily kept over a thousand dollars in a shoebox in his home, and that he had kept between four and eight thousand dollars in that shoebox during the time period covered by the indictment. There was also evidence that DeVora Cunningham drove two expensive late-model cars.

II.

A

At trial, defendants made a motion in limine to exclude all testimony regarding Charles Johnson and the Wisconsin counterfeiting operation. They argued that this evidence is irrelevant, Fed. R. Evid. 401 & 402, because the source of counterfeit currency need not be shown to establish its counterfeit nature and because defendants were not alleged to be involved in any way with the Wisconsin operation. They also argued that, even if relevant, the evidence is substantially more prejudicial than probative, Fed. R. Evid. 403, because it taints defendants with Johnson's guilt but has no legitimate connection with the case against them.

No objection on hearsay grounds was made at trial. Thus, we do not address the claim raised in defendants' brief that

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the guilty plea was not admissible under the "statement by a co-conspirator" clause of Fed. R. Evid. 801(d)(2)(E) (pertaining to admissions by a party-opponent), nor do we address the government's argument that the guilty plea is admissible hearsay under Fed. R. Evid. 804(b)(3) as a statement against interest.

In response to defendants' motion to exclude all evidence regarding Charles Johnson, the prosecutor cited *United States v. Ritz*, 548 F.2d 510, 522 (5th Cir. 1977), for the proposition that:

> "[T]he close association of the parties, i.e. Johnson and these Defendants, and particularly the parties' association with the source of the counterfeit currency, is one circumstance from which knowledge can be inferred by the jury."

The close congruence between this theory for the admissibility of the evidence and defendants' theory for its inadmissibility—that the government sought to substitute an inference of guilt by association for proof of the elements of the crime—suggests that the admissibility of the government's proofs was an issue not entirely beyond question.

The trial judge, however, in the exercise of his discretion, found the evidence to be prejudicial but also highly relevant on the issue of knowledge and fraudulent intent, and concluded that the prejudice did not substantially outweigh probative value under Fed. R. Evid. 403. The evidence was admitted.

This ruling by the trial judge is challenged here only insofar as it encompassed the government's offer of proof of Johnson's guilty plea. We are thus not called upon to review the overall soundness of the government's "close association with the source" theory of admissibility. Rather, we must consider whether the trial judge erred in his assessment of the probative value of one concededly prejudicial element of the government's circumstantial proofs.

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In the course of his testimony regarding the Milwaukee counterfeiting investigation, Secret Service Agent Gene Cunningham was asked if he knew "the disposition of Charles Johnson in Milwaukee, Wisconsin." He responded: "He pled guilty to the two-count Indictment charging him of conspiracy in the counterfeiting charge."

There is nothing in the record to suggest exactly why this particular testimony was considered relevant. In context, it seems to do no more than corroborate the fact that Johnson was involved in a counterfeiting scheme. The bare fact of his plea adds no detail or substance to what would otherwise already be known about Johnson. A willingness to plead guilty does not imply a general tendency to speak openly about one's criminal activities. Of itself, therefore, the guilty plea is little more than cumulative evidence on a collateral matter. We do not believe that the trial court held the plea —the most clearly prejudicial aspect of the government's proofs with respect to Johnson—to be relevant simply because it helped prove that Johnson was a counterfeiter.

On the basis of the government's arguments and assertions during the motion in limine, the court had grounds to believe that Johnson's guilty plea was being offered on the issue of defendants' knowledge because Johnson's plea—like the other information on Johnson's counterfeiting activities—was something defendants *could have known about* at the time of his Detroit visit or shortly thereafter. In this view of what the government offered to prove, the guilty plea would be significantly more probative of defendants' knowledge than other evidence of Johnson's involvement with counterfeiters. Generally, one may be inclined to keep one's criminal activities secret even from family and friends, but, once one has been convicted, secrecy would be much less feasible and probably pointless. Taken in conjunction with the other circumstantial evidence in the case, evidence that Johnson was a self-confessed and convicted counterfeiter would certainly

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fortify the inference that large-denomination bills obtained from him were obtained in the knowledge that they were counterfeit, providing the Cunninghams knew of the guilty plea.

The premise of the guilty plea's relevance, therefore, is that the plea occurred prior to the time when, according to the indictment, defendants "knowingly" agreed to pass and subsequently did pass counterfeit bills. According to the indictment, this knowledge existed as of February 21, 1984. According to the testimony of Joseph Viviano, the Secret Service agent who investigated the defendants in Detroit, the Secret Service did not take its initial action against the Milwaukee counterfeiters until two days later: "The Milwaukee office so-to-speak busted this plant or stopped the operation on February 23, 1984 . . . ." Milwaukee Secret Service Agent Cunningham, who was directly involved with the Milwaukee investigation, testified that that investigation did not even begin until February of 1984.

This testimony strongly suggests that defendants could not have known of Johnson's guilty plea—which must have occurred sometime after the operation was discovered and shut down—at any time covered by the indictment. Furthermore, this testimony plainly implies that the plea could not have been made before February 21, 1984, when the first counterfeit bills were passed in Detroit.

Even if the record does not clearly support an inference that Johnson's guilty plea postdated the period covered by the indictment in this case, there is no contrary showing anywhere in the record that the Cunninghams knew of Johnson's guilty plea at any pertinent time. Because such a showing was an implicit premise of the guilty plea's relevance, this evidence does not make defendants' guilty knowledge any more probable than it would be without the evidence. Therefore, Johnson's guilty plea was strictly irrelevant under Fed. R. Evid. 401 and its admission was error.

C

The Supreme Court has "consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless . . . ." *United States v. Lane*, 474 U.S. __, __ ; 88 L. Ed. 2d 814, 823 (1986). Despite the clear danger of guilt by association foreboded by an offer to prove that a relative of defendants has been convicted of the same crime for which they are on trial, we conclude, on the basis of the whole record in this case, that the trial court's error was harmless. Fed. R. Crim. P. 52(a).

As this Court has previously remarked: "An error in the admission of evidence may be cured by the subsequent use of similar evidence by the opposite party." *Cordle v. Allied Chemical*, 309 F.2d 821, 825 (6th Cir. 1962). Until defendant Larry Cunningham took the stand to testify, all that was known about Johnson was that phone calls had been made between his phone number and defendants' phone numbers and that the bills passed by defendants came from an operation with which Johnson was connected. Larry Cunningham fleshed this association out significantly, attempting to utilize it to his advantage, by testifying that Johnson was his brother-in-law and that Johnson had stayed in his home in Detroit. Having chosen to make advantageous use of the Johnson connection, and to distance themselves from Johnson by suggesting that they were the innocent dupes of a known criminal, defendants waived further objection to this evidence. Thus, even if admitting evidence about Johnson had initially been erroneous, the error would have been obviated by defendants' own testimony.

Furthermore, while we are loath to penalize the defense for making the best of an adverse ruling, defense counsel's effort to distance his clients from Johnson was well served by the evidence of Johnson's guilty plea. Larry Cunningham testified that he had learned of Johnson's guilty plea only from testimony at trial. Then, in his closing argument, defense counsel chose to stress Johnson's guilty plea in words

clearly intended to ring in the jurors' ears as they departed to deliberate:

> "[Y]ou have to understand, we don't know how that money got there and my clients to this day still don't know for sure. But they do know one thing. They know that Charles Johnson pled guilty to conspiracy to counterfeit. They know they have not pleaded guilty. They know they are before you asking for justice and I ask you to give them justice."

In this final plea to the jury, defense counsel sought to reverse the implication of guilt by association by suggesting that Johnson's guilt was the premise of defendants' innocence; that because we now know Johnson to be a convicted counterfeiter, it is more probable that he would have planted counterfeit bills in defendants' home in such a way as to implicate them in his counterfeiting scheme. If the jury rejected this appeal, it was not because defendants had already been irretrievably tainted with Johnson's guilt, but simply because the government's theory was better substantiated and more consistent with the other evidence presented. In the context of the undisputed evidence that Johnson was a counterfeiter, evidence the admissibility of which is not challenged here, and in light of the use made of his guilty plea by the defense, admission of the guilty plea in evidence had little, if any, impact upon the overall tenor of the evidence which convicted defendants.

Accordingly, we hold that while the guilty plea was irrelevant to prove what it was originally offered to prove, the decision to admit this evidence was harmless error.

III.

A

Defendants' second assignment of error relates to the prosecutor's allusion, in her closing argument, to the size of defendant DeVora Cunningham's checking account balance. This

evidence had been excluded by the trial court upon timely objection by the defense.

At trial, in response to the prosecutor's suggestion that defendants had no need to buy money orders except to "launder" the counterfeit bills, Larry Cunningham testified that his bank had mistakenly deposited ten thousand dollars intended for his commercial checking account into his commercial savings account. On cross-examination, DeVora Cunningham testified, *without objection,* that she had a checking account. It is not clear from the record whether this was a different account from the checking account previously mentioned. Subsequently, the prosecutor sought to suggest that DeVora Cunningham's checking account had a balance over one thousand dollars at the time she was buying money orders for such purposes as paying her credit card bills. It was only at this point that defendants' objection to the question was sustained. Thus, it is only the size of the balance in this account which was excluded by the trial court's ruling.

In her closing argument, the prosecutor alluded to this excluded evidence:

> "DeVora Cunningham says she has a checking account, but nonetheless, she wanted to pay all of these bills, the Hughes & Hatcher and the Visa and the mother, that we have offered into evidence, with money orders. Well, she indicated that it is simpler to write a check. *She had over a thousand dollars in her checking account.* Why not just sit and write a check? Why go out and buy a money order? Why stand in line with money and buy a money order? There is simply no explanation for that. Unless, of course, you are buying it with counterfeit money." (Emphasis added.)

In his closing, defense counsel responded:

> "I want to give you one example of the behavior of the U.S. Attorney's Office in this case. In closing

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> argument, and out of courtesy, I did not get up and object. I did not interrupt the U.S. Attorney. But you will recall, when she was questioning my client, Mrs. Cunningham, this morning she wanted to ask about her checking account at a Michigan National Bank. I objected. The Judge sustained my objection. The Judge said anything about that bank account was irrelevant. That means that there was no evidence introduced about that bank account.
>
> "In closing argument we are limited to the evidence that came from the witness stand and the exhibits which were brought in and brought in and given to you and given to the Court as exhibits. But in closing argument, despite the Judge's sustaining of my objection, the U.S. Attorney had the audacity to tell you that my client had $1,000 in another checking account. See, that is something that she should be reprimanded for. Not by me but by the Court. But I will leave that alone. I just want to bring that to your attention because out of courtesy I did not object at that time and I had a proper objection because my objection had been sustained. That meant she was prohibited from making any mention of that bank account."

In rebuttal, the prosecutor cautioned the jury to hold her admitted misstep against her rather than the government. The trial court's instructions then reminded the jurors once again that closing arguments are not evidence.

B

Defense counsel chose not to object to the prosecutor's error in a timely fashion, preferring instead to dwell upon the error himself and to mischaracterize the scope of the court's exclusion, which clearly extended only to the account balance, not to the existence of the account. Defendants now

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contend that it was reversible error on the trial court's part not to declare a mistrial *sua sponte*. We reject this contention.

Because defendants failed to object, move for a mistrial, or request a curative instruction, this Court can reverse only if it finds that plain error was committed, Fed. R. Crim. P. 52(b); *United States v. Benson*, 389 F.2d 376, 378-79 (6th Cir.), *cert. denied*, 391 U.S. 903, (1968). In *United States v. Young*, 470 U.S. __, 84 L. Ed. 2d 1 (1985), the Supreme Court reversed a finding of plain error despite improper closing argument by the prosecutor that was much more sustained and egregious than the isolated incident here.

In *Young*, the prosecutor repeatedly expressed his personal opinion of the guilt of the defendant, referred to his own expertise as a prosecutor to bolster this opinion, and told the jury that if they acquitted they would not be "doing [their] job as jurors." 84 L. Ed. 2d at 6; 84 L. Ed. 2d at 16 (Brennan, J., concurring in part and dissenting in part). Despite prosecutorial conduct that was clearly in violation of ethical rules, the Court held that there was no reversible error, in the absence of timely objection, when the prosecutor's conduct was viewed in the whole context of the case.

In the context of this case, we fail to perceive how this isolated error could have prejudiced defendants. The existence of bank accounts had been admitted without objection. The relevance of the bank account balance had been clearly shown. Other evidence had incidentally made defendants' material circumstances manifest to the jury. The record does not reflect a trial strategy by the prosecutor of "persistent appeal to class prejudice." *United States v. Stahl*, 616 F.2d 30, 33 (2d Cir. 1980). By the end of the trial, any justification for the initial ruling excluding the evidence had evaporated. The prosecutor's improper allusion to the excluded bank balance was therefore incapable of swaying the jury.

In *Young*, an important aspect of the context was that misconduct by defense counsel had "invited" an improper pro-

secutorial response. While there is no comparable circumstance here, we can say, with the *Young* Court, that: "Viewed in context, the prosecutor's statements, although inappropriate and amounting to error, were not such as to undermine the fundamental fairness of the trial and contribute to a miscarriage of justice." *Young*, 84 L. Ed. 2d at 13. We therefore hold that it was not error that the court failed to declare a mistrial in response to the prosecutor's misconduct in alluding to excluded evidence.

Defendants' convictions are AFFIRMED.

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No.

IN THE

SUPREME COURT

OF THE UNITED STATES

October Term, 1986

Larry Cunningham and
Devora Cunningham,
Petitioners,

-vs-

The United States of America,
Respondent.

Court of Appeals No: 85-1032
District Court No: 84 20220

CERTIFICATE OF FILING

Elbert L. Hatchett, in compliance with Supreme Court Rule 28.2, does certify that he is a member of the Bar of the Supreme Court of the United States, that proof of the filing of the Petition for Writ of Certiorari to the Clerk of the Supreme Court of the United States, Washington, D.C., 20543 is hereby made, same being mailed through by Federal Express Mail, first class, next day service on the 26th day of December, 1986.

bscribed and sworn before me, this 26th
y of December, 19 86 a Notary Public
nd for Oakland County,
higan.

Maria Taylor
(Signature)
NOTARY PUBLIC
Commission expires 1-7 19 87

ELBERT L. HATCHETT

No.

IN THE

SUPREME COURT

OF THE UNITED STATES

October Term, 1986

Larry Cunningham and
Devora Cunningham,
Petitioners,

-vs-

The United States of America,
Respondent.

Court of Appeals No: 85-1032
District Court No: 84 20220

APPEARANCE OF COUNSEL

Please enter my appearance in the above entitled cause. I certify that I am a member of the Bar of the Supreme Court of the United States.

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No.

IN THE

SUPREME COURT

OF THE UNITED STATES

October Term, 1986

Larry Cunningham and
Devora Cunningham,
Petitioners,

-vs-

The United States of America,
Respondent.

Court of Appeals No: 85-1032
District Court No: 84 20220

CERTIFICATE OF SERVICE

Althea M. Hooks, being first duly sworn, deposes and states that on the 26th day of December, 1986 she served a copy of the Petition for Writ of Certiorari to the Solicitor General, Department of Justice, Washington, D.C., 20530, same being mailed through the United States Post Office, first class,

Subscribed and sworn before me, this 26 day of Dec, 1986, a Notary Public in and for Oakland County, Michigan.

Althea M. Hooks
ALTHEA M. HOOKS

Notary Public
My Commission expires 4/7/87

Supreme Court, U.S.
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No. 86-1149

In the Supreme Court of the United States

OCTOBER TERM, 1986

LARRY CUNNINGHAM AND DEVORA CUNNINGHAM,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court's admission of evidence of a third party's prior conviction was harmless error.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 804 F.2d 58.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1986. The petition for a writ of certiorari was filed on December 27, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioners were each convicted on one count of conspiracy to pass counterfeit money, in violation of 18 U.S.C. 371 and 472, and several substantive counts of passing counterfeit money, in violation of 18 U.S.C. 472 (Pet. App. 1). Petitioner Larry Cunningham was sentenced on the conspiracy count to a suspended five-year term of imprisonment and placed on three years' probation with the condition that he serve 120 days in a community treatment center; he was also sentenced to a concurrent three-year probationary term on the substantive counts, and he was ordered to make restitution and to pay a $5,000 fine. Petitioner DeVora Cunningham was sentenced to a suspended six-month term of imprisonment, placed on two years' probation, and ordered to make full restitution and pay a $5,000 fine. Gov't C.A. Br. 2.

1. a. The evidence at trial showed that between February 21 and March 18, 1984, petitioners passed nine counterfeit $50 and $20 bills at five different locations in Detroit. The "central issue" at trial was whether they knew the bills were counterfeit when they passed them. Pet. App. 2-3, 8-9.

The government presented a great deal of evidence on this point. First, all the notes came from the same counterfeiting operation in Milwaukee, Wisconsin, for which Charles Johnson—who was DeVora Cunningham's brother-in-law—had furnished the paper. A Secret Service agent testified that Johnson had pleaded guilty to conspiracy for his role in the Milwaukee counterfeiting scheme. Johnson had stayed at petitioners' home immediately before the notes were passed, and there had been numerous tele-

phone calls between Johnson's residence and petitioners' residence and business before, during, and after the time of the charged conspiracy. Second, the government's evidence showed that one of the notes was passed *after* the telephone company informed petitioner Larry Cunningham that three of the bills he had used to pay his telephone bill were counterfeit. Third, one witness was able to identify Larry Cunningham as the person who passed a counterfeit bill because " 'he asked me if we had to check the bill and I never had anyone ask me that before' " (Pet. App. 2). Fourth, the prosecution produced evidence that petitioners inexplicably bought money orders with the counterfeit notes even though they had a checking account at the time. Finally, petitioners themselves offered various inconsistent explanations at trial about where they obtained the counterfeit bills. *Id.* at 2-3.

Petitioners' defense was that they had been "innocent dupes of a known criminal" (Pet. App. 8). They asserted that Johnson had had the opportunity to place the bills in a shoebox where they kept cash at their home (*id.* at 3). They said that the phone calls had been "innocent social conversations" between petitioner DeVora Cunningham and her sister (*ibid.*). Petitioners further asserted that they had not learned of Johnson's guilty plea until the trial in this case (*id.* at 8).

b. At trial, petitioners made a motion in limine to exclude certain evidence regarding Charles Johnson. They argued that the admission of evidence regarding Johnson's counterfeiting activities and petitioners' connection with him was unduly prejudicial, particularly since Johnson was not charged as a coconspirator. Petitioners did not specifically object to

the admission of Johnson's guilty plea, but only to the telephone logs and the bills from the Johnson operation. The government countered that its evidence was quite relevant to the key element in the case—petitioners' criminal intent. The district court ruled that the evidence would be admitted because its probative value was strong enough to substantially outweigh any danger of unfair prejudice. II Tr. 90-102; see also *id.* at 104-111; Pet. App. 4-5.

2. On appeal, petitioners narrowed their challenge to the "Johnson evidence" and attacked only the admission of his guilty plea. Petitioners contended that the guilty plea by Johnson was hearsay evidence from an unnamed co-conspirator, and that an inadequate foundation had been laid for its admission. See Pet. App. 5; Appellants' C.A. Br. 5-9.[1]

Because no hearsay objection was raised below, the court of appeals declined to address petitioners' hearsay claim or the government's counterargument that Johnson's guilty plea was admissible under Fed. R. Evid. 804(b)(3) as a statement against penal interest. Instead, the court of appeals reviewed the district court's finding that the guilty plea was properly admissible because, although prejudicial, it was relevant to the issues of petitioners' knowledge that the bills were counterfeit and their intent to defraud. Pet. App. 4-5.

The court of appeals held that admission of the guilty plea evidence was error because it was irrele-

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[1] In their appeal, petitioners also challenged an inadvertent misstatement of evidence in the government's closing argument. The court of appeals found that the error was harmless. Petitioners have not pursued that issue here. See Pet. App. 9-13.

vant under Fed. R. Evid. 401. The court reasoned that, because petitioners first passed the counterfeit bills in Detroit on February 21, 1984, and the government did not take action against Johnson's operation until February 23, 1984,[2] it was unlikely that Johnson pleaded guilty prior to the time petitioners passed the bills at issue in this case. Thus, the court concluded, the plea—and petitioners' presumed awareness of it—could have had no bearing on petitioners' criminal intent. Pet. App. 6-7.

The court of appeals further concluded, however, that " 'consider[ing] the trial record as a whole,' " the error was harmless. Pet. App. 8 (quoting *United States* v. *Lane*, No. 84-744 (Jan. 27, 1986), slip op. 7). The court stressed that other, undisputed evidence established that Johnson was a counterfeiter, and that it was the defense that made the most extensive use of Johnson's counterfeiting activities and "fleshed out" his relationship with petitioners. Pet. App. 8-9.

ARGUMENT

1. Petitioners first contend that the evidence of Johnson's guilty plea was improperly admitted because it was hearsay for which no proper foundation had been laid (Pet. 4-10). That claim plainly does not merit review. The court of appeals held that the guilty plea evidence was improperly admitted because it was irrelevant; it therefore can hardly matter if the admission of the evidence was also improper under a second theory. Moreover, as the court of appeals pointed out (Pet. App. 4-5), petitioners failed to make a hearsay objection at trial. Thus,

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[2] The record is silent as to exactly when Johnson pleaded guilty (Pet. App. 3).

the hearsay claim could prevail only if the admission of the evidence was "plain error" (see Fed. R. Crim. P. 52; Fed. R. Evid. 103(a) and (d)); there is no reason to suppose that the claimed hearsay violation was plain error when the court held that the admission of the evidence, albeit erroneous, was harmless.[3]

2. Petitioners also argue (Pet. 10-12) that the court of appeals erred in concluding that the admission of Johnson's conviction was harmless error. This fact-bound issue does not warrant review by this Court, and in any event the court of appeals was surely correct in concluding (Pet. App. 8-9) that the error was harmless. Petitioners nowhere explain how the admission of the plea could have prejudiced them. Johnson's activities as a counterfeiter and his connection with petitioners are not disputed and were well established by other evidence not challenged here.[4] Furthermore, as the court of appeals

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[3] In any event, petitioners' claim of a hearsay violation is groundless. The government did not purport to rely on the co-conspirator exception to the hearsay rule, so petitioners' discussion of the procedures under Fed. R. Evid. 801(d)(2)(E) (Pet. 5-10) is completely beside the point. Had a hearsay objection been made at trial, it is much more likely that the government would have argued that the guilty plea was admissible as a statement against interest within Fed. R. Evid. 804(b)(3) (Johnson had told the government that he would invoke the Fifth Amendment if called, so he was "unavailable"). See Gov't C.A. Br. 12-13; *United States* v. *Winley*, 638 F.2d 560, 561-563 (2d Cir. 1981), cert. denied, 455 U.S. 959 (1982).

[4] As noted above, the evidence at trial showed that the counterfeit bills passed by petitioners all came from the same Milwaukee, Wisconsin, counterfeiting operation; that Johnson had furnished the paper for that operation; that Johnson had stayed at petitioners' home just before the bills were passed;

pointed out, petitioners elaborated and relied on Johnson's criminal activities as part of their own defense; indeed, Johnson's guilty plea was stressed in petitioners' closing argument to the jury (*ibid.*).

The defense featured Johnson's role as a counterfeiter as part of its explanation of how the counterfeit bills came into petitioners' possession without their knowledge. According to the defense, Johnson took advantage of his relationship with petitioners by gaining access to the shoebox where they kept cash and by substituting his own counterfeit bills for the real ones petitioners had in the shoebox. Thus, far from being prejudicial to petitioners, the evidence of Johnson's counterfeiting activities was a principal feature of their trial strategy. See Pet. App. 3, 8-9.

Even if the "Johnson evidence" had been prejudicial to petitioners, and even if the force of that evidence would have been substantially undercut by the exclusion of Johnson's guilty plea, there was ample other evidence of petitioners' criminal intent. Petitioner Larry Cunningham passed an illegal note *after* he had been told by the telephone company that the bills were counterfeit; his behavior when passing another note evidenced knowledge that the note was counterfeit; petitioners purchased unnecessary money orders with the notes; and they gave inconsistent explanations for where they obtained the bills. The court of appeals was therefore correct in concluding that any error in the admission of the guilty plea was plainly harmless.

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and that there were numerous telephone calls between Johnson's residence and petitioners' residence and business office around the time petitioners passed the counterfeit bills.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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